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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/526,577	09/22/2005	Sylvie Pridmore-Merten	112701-597	3814
29157 7590 07/24/2009 K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690				
EXAMINER				
CLARK, AMY LYNN				
ART UNIT		PAPER NUMBER		
1655				
NOTIFICATION DATE		DELIVERY MODE		
07/24/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

**Office Action Summary****Application No.**

10/526,577

**Applicant(s)**

PRIDMORE-MERTEN ET AL.

**Examiner**

Amy L. Clark

**Art Unit**

1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 04 May 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-8 and 17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 and 17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/CDC)
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date: \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_
- Paper No(s)/Mail Date: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 05/04/2009 has been entered.

### ***Election/Restrictions***

The election/restriction requirement between the method and composition remains for reasons of record. However, the species election requirement has been withdrawn.

Claims 1-8 and 17 are currently under examination.

Any rejection made in the previous Office action and not repeated herein has been withdrawn based upon Applicant's amendments to the claims.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### ***Claim Objections***

Claims 2-8 and 17 are objected to because of the following informalities: "A composition" does not properly refer back to the composition of claim 1. Therefore, the preamble of the claims should read The composition. Appropriate correction is required.

Claims 7 objected to because of the following informalities: The article is missing from before the term "ingredient" and the claim is missing the period at the end. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

Claim 3 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The metes and bounds of claim 3 are rendered uncertain by the phrase "a compound that upregulate their biosynthesis in vivo" because it is unclear as to what Applicant regards as "their". Is Applicant referring to energy metabolism of a cell or to one or more of the compounds listed before this phrase? Further, it is unclear as to what Applicant means by "glutathione or natural sources thereof" in line 3 bridging line 4 because it is unclear if Applicant means natural sources of thiols or natural sources of glutathione itself. If Applicant means glutathione itself, then a coordinating conjunction

needs to be placed between "taurine" and "glutathione". Finally, it is unclear as to what Applicant means by "soy extracts and other sources of flavonoids with antioxidant activity and ursodeoxycholic acid" because it is unclear if Applicant means sources of flavonoids with antioxidant activity beside soy extracts, and if Applicant means other sources of flavonoids with antioxidant activity in addition to ursodeoxycholic acid or if Applicants mean one of these sources and other sources further selected from ursodeoxycholic acid and the list of ingredients that come after it. The lack of clarity renders the claims indefinite since the resulting claims do not clearly set forth the metes and bounds of the patent protection desired.

***Claim Rejections - 35 USC § 102/103***

Claims 1-8 and 17 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Hamilton (B\*, US 20010043983 A1).

Hamilton teaches a pet food, pet treat and pet supplement composition comprising R-.alpha.-lipoic acid in an amount of 0.10 grams to 1.5 grams and L-carnitine (which reads on a molecule that stimulates energy metabolism of a cell) in an amount of 0.10 g to 3 g in addition to the usual composition, that co-enzyme Q (which is a type of ubiquinone and reads on antioxidant in an amount sufficient to improve hair or coat quality of an animal) can be added in the amount of at least 1 mg/day and that creatine can be added in an amount of at least 0.2 g/day (See abstract).

Hamilton further teaches that NuFood was created specifically for pet owners concerned with giving their dogs top quality nutrition and made with only the best ingredients that are suitable for human consumption (which reads on nutritionally complete human food and pet food and dietary supplement for human/animal consumption). Hamilton further teaches that NuFood is made with 100% pure chicken meat, and is prepared to provide a pure, tasty and highly digestible meal. Hamilton further teaches that NuFood further comprises corn, breadcrumbs and water (which reads on an orally acceptable carrier), and further comprises at least 0.1 grams of R- $\alpha$ -lipoic acid, at least 0.1 g L-carnitine and at least 1 mg of Q<sub>10</sub> (which is synonymous with ubiquinone or co-enzyme Q<sub>10</sub> and is known in the art to be an antioxidant) and at least 0.2 grams of creatine per day (which reads on an admixture) (See Example 6, paragraphs 0054 and 0055).

Hamilton further teaches Eukanuba Senior Maintenance (IAMS), which is formulated to help nutritionally stabilize a senior dog's digestive system and support a healthy intestinal environment comprising increased levels of antioxidants, chicken-by-product meal, corn meal, sorghum, whole grain barley, chicken, fish meal, dried beet pulp, chicken fat (which reads on orally acceptable carrier) preserved with mixed tocopherols, a source of vitamin E and citric acid (which reads on antioxidants) and contains omega-3-fatty acids in a minimum amount of 0.25% (which reads on the limitations of claim 17) and further comprises at least 0.1 g R- $\alpha$ -lipoic acid, at least 0.1 g of L-carnitine, and least 1 mg of Q<sub>10</sub> (which is synonymous with ubiquinone or co-enzyme Q<sub>10</sub> and is known in the art to be an antioxidant) and at least 0.2 grams of

creatine per day (which reads on an admixture) (See Example 1, paragraphs 0043 and 0044).

Although Hamilton does not expressly teach that the antioxidant improves hair or coat quality of an animal or that the ingredient stimulates hair growth or that the ingredient modulates hair sebum lipid production and/or composition, the claimed functional properties are inherent to the preparation taught by Hamilton because the ingredients are one and the same as disclosed in the instantly claimed invention of Applicant. Thus, L-carnitine combined with Q<sub>10</sub> (ubiquinone), R- $\alpha$ . lipoic acid, and/or omega-3-fatty acid would be expected to stimulate hair growth and modulate hair sebum lipid production and/or composition and Q<sub>10</sub> (ubiquinone), R- $\alpha$ . lipoic acid and/or mixed tocopherols would be expected to improve hair or coat quality. Therefore, the reference anticipates the claimed subject matter.

In the alternative, even if the claimed pet food composition for oral administration comprising an ingredient comprising an admixture of a molecule that stimulates energy metabolism of a cell and an antioxidant to improve hair or coat quality of an animal in an orally acceptable carrier is not identical to the pet food composition taught by Hamilton with regard to some unidentified characteristics, the differences between that which is disclosed and that which is claimed are considered to be so slight that the pet food composition taught by Hamilton is likely to intrinsically possess the same characteristics (including with respect to the instantly claimed functional effects) of the claimed particularly in view of the similar characteristics which they have been shown to share. Thus, the claimed pet food composition for oral administration comprising an ingredient

comprising an admixture of a molecule that stimulates energy metabolism of a cell and an antioxidant to improve hair or coat quality of an animal in an orally acceptable carrier would have been obvious to those of ordinary skill in the art within the meaning of USC 103. Accordingly, the claimed invention as a whole was at *least prima facie* obvious, if not anticipated by the cited reference, especially in the absence of sufficient, clear, and convincing evidence to the contrary.

With respect to the USC 102/103 rejection above, please note that the Patent and Trademark Office is not equipped to conduct experimentation in order to determine whether Applicant's claimed pet food composition for oral administration comprising an ingredient comprising an admixture of a molecule that stimulates energy metabolism of a cell and an antioxidant to improve hair or coat quality of an animal in an orally acceptable carrier is different and, if so, to what extent, from that of the pet food composition taught by Hamilton. Therefore, with the showing of the reference, the burden of establishing non-obviousness by objective evidence is shifted to the Applicants.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140



F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5 and 12 of copending Application No. 10/527,097 and 18 and 19 of copending Application No. 10/597,436. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims in all three applications are drawn to an orally administered composition comprising of a molecule that stimulates energy metabolism of a cell and/or an antioxidant to improve hair or coat quality of an animal in an orally acceptable carrier.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Response to Arguments***

Applicant's arguments with respect to the rejection of claims 1-8 under 35 U.S.C. 102(b) as being anticipated by Lucas et al. (A, US Patent Number: 4753926) and

under 35 U.S.C. 102(a) as being anticipated by Hamilton (N\*, WO 0211717 A1) have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

**No claims are allowed.**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amy L. Clark whose telephone number is (571)272-1310. The examiner can normally be reached on Monday to Friday between 8:30am - 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

ALC  
July 17, 2009

/Amy L Clark/  
Examiner, Art Unit 1655